In the

Supreme Court of the United States

1978 Term

No. 78-1933

STEVEN H. MONTGOMERY, Individually, and d/b/a
LAMINATING COMPANY OF COLORADO,
and d/b/a
AMERICAN LAMINATING COMPANY,
PETITIONER,
v.
CENTURY LAMINATING, LTD.,
RESPONDENT.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

William J. Lock

Attorney for the Respondent
507 Roma, Northwest
Albuquerque, New Mexico 87102
(505) 843-6031

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LIST OF AUTHORITIES CITED

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

CENTURY LAMINATING, LTD., the Respondent herein, prays that the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied, and that the judgment of the United States Court of Appeals for the Tenth Circuit entered on April 2, 1979, be affirmed and ratified in all respects.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 595 F.2d 563 and is printed in Appendix A of the Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The Petitioner's statement of jurisdiction is sufficient.

QUESTIONS PRESENTED

The Respondent respectfully suggests that there are two questions presented rather than the single question as noted by the Petitioner, and the Respondent would also suggest that the question as identified by the Petitioner be more precisely worded. The Respondent would show these two questions as follows:

1. Where a notice of appeal is filed during the pendency of a Rule 50 motion, and is therefore filed prior to the entry of a final judgment, may an appellate court accept the notice of appeal as if it were filed for review of a final judgment pursuant to 28 U.S.C. §1291, or does the premature filing of the notice of appeal deprive the appellate court of jurisdiction?

2. Where a notice of appeal is filed during the pendency of a Rule 50 motion and also during the pendency of a motion for injunction, which injunction was entered 60 days after the notice of appeal was filed, and from which injunction no notice of appeal was filed, may an appellate court accept the notice of appeal as if it were filed for review of the final judgment and injunction pursuant to 28 U.S.C. §1291, or does the failure to file the notice of appeal from the injunction deprive the appellate court of jurisdiction?

STATUTES AND FEDERAL RULES INVOLVED

The Petitioner's statement thereof is sufficient.

SUPPLEMENTARY STATEMENT OF THE CASE

The Petitioner's statement of the case is correct, although not concise, but the Respondent would respectfully offer the following outline in sequence of essential facts for the easier understanding of the issues. This sequence of the material facts is as follows:

1. Judgment was entered on the jury verdict against the Petitioner on May 11, 1977.

2. The Petitioner's Rule 50 (b) Motion for Judgment Notwithstanding the Verdict (hereinafter Motion for Judgment n.o.v.) was filed on May 19, 1977.

3. The Respondent's Motion for Injunction was filed on May 19, 1977.

4. The Petitioner's Notice of Appeal was filed on June 10, 1977 (the other Defendant, American Laminating Company, a Colorado corporation, did not appeal).

5. The United States District Court for the District of New Mexico denied the Petitioner's Rule 50 (b) Motion on June 14, 1977.

6. The District Court for the District of New Mexico entered the Injunction on August 9, 1977.

7. The Petitioner filed a Motion for Stay of the Injunction on September 7, 1977.

8. The District Court for the District of New Mexico denied the Motion for Stay of Injunction on November 9, 1977.

9. No notices of appeal were filed from the denial of the Motion for Judgment n.o.v., from the Injunction, or from the denial of the Motion for Stay of the Injunction.

ARGUMENTS AND AUTHORITIES AGAINST GRANTING THE WRIT

The Respondent submits the following arguments and authorities against granting the writ as requested by the Petitioner.

POINT I

APPEALS LIE ONLY FROM FINAL DECISIONS

The language of 28 U.S.C. §1291 clearly provides that "Courts of Appeals shall have jurisdiction of appeals from all final decisions. . . ." Strong policy reasoning supports the definition of "final decisions," and this Court has recently stated that "federal appellate jurisdiction generally depends on the existence of a decision by the district court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' [citations omitted]" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). This Court also has pointed out the policy behind requiring a final decision prior to appeal in the case of *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976), wherein an appeal was dismissed and remanded to the district court when an appeal was taken from an interlocutory order.

As is clearly stated in Rule 4, Federal Rules of Appellate Procedure, the running of the time for filing a notice of appeal is terminated by the timely filing of certain motions. "When such post-trial motion is made, any judgment heretofore entered ceases to be final until the motion is ruled upon." *Wiggs v. Courshon*, 485 F.2d 1281 (5th Cir. 1973). The reason for this is that where the court has power to further review its judgment, the judgment is not final as long as it is being considered by the court. This Court said in *Leishman v. Associated Electric Co.*, 318 U.S. 203 (1943), that when such motions are addressed to questions of substance and not mere matters of form and therefore that the effect of the motion was to ask that rights

already adjudicated be altered, such a motion deprived the judgment of that finality which is essential to appealability. In addition, this Court has specifically equated such prematurity by virtue of pending motions as a nullity, and dismissed the premature appeal. *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 177 (1944).

Therefore, except for judicial and statutory exceptions which have been created, appeals lie only from final judgments, and a judgment is not final during the pendency of certain motions, such as a Rule 50 motion, and only becomes final when a decision has been rendered on such a motion.

POINT II

THE PREMATURE NOTICE OF APPEAL DEPRIVES THE APPELLATE COURT OF JURISDICTION

As was discussed in Point I hereinabove, normally a premature appeal (from a non-final judgment) is a nullity, and is, therefore, dismissed. This is the technical requirement of the cases as well as of Rule 4 of the Federal Rules of Appellate Procedure. Ignoring for purposes of discussion in this Point II the Injunction which was entered two months after the Notice of Appeal (from which there was no appeal), at the time the Notice of Appeal was filed, the Judgment based upon the jury verdict was not final. Therefore, the appeal was premature because of the pendency of the Rule 50 Motion filed by the Petitioner. With the subsequent denial of the Rule 50 (b) Motion by the district court four days after the filing of the Notice of Appeal, the Judgment became final and therefore appealable, under the provisions of Rule 4. From this denial, there was no appeal. There is no dispute on this, as the Petitioner notes at Page 5 of his Petition for Writ of Certiorari that "he does not contest the fact that judgment entered on the jury verdict on May 11, 1977, was *not a final judgment*. . ." [emphasis added].

The Court of Appeals for the Tenth Circuit carefully considered the facts, the issues and the policy considerations when it rendered its decision in this matter. *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir. 1979). The Tenth Circuit distinguished the case at bar from the case of *Morris v. Uhl & Lopez Engineers, Inc.*, 442 F.2d 1247 (10th Cir. 1971), which lacked finality only because of a failure to comply with the formalities of Rule 54 (b). The court below pointed out the very important policy difference that at the time the Notice of Appeal was filed, "his Motion for Judgment n.o.v. was pending - - the disposition of which clearly could have changed the form and content of the judgment." *Century* at 566. This

factor, that the trial court could have materially changed the judgment as originally entered, is a significant factor which needs to be compared with the other cases concerning the allowance or dismissal of appeals under premature notices of appeal.

The well reasoned opinion of the Tenth Circuit in this matter represents strong authority for denial of Petitioner's Writ. The Tenth Circuit correctly pointed out the division in the circuits on this issue and took a well-balanced approach between the sometimes conflicting technical requirements of the rules and other policy considerations. For example, the court clearly pointed out that "[a]lthough the premature notice of appeal did not transfer jurisdiction to this court, Montgomery did not lose his right to appeal. Within 30 days after entry of the order denying the motion for judgment n.o.v., he could have filed a new notice of appeal. . . ." *Century* at 568.

The Tenth Circuit premised its decision upon the rule that the finality requirement for appeal must have been satisfied at the time of filing of the notice of appeal. Here, however, the filing of the Rule 50 Motion prevented such finality, which is conceded by the Petitioner. The court below quoted two important decisions of this Court in upholding the reasons for continuing the finality doctrine, including preventing the thrusting of appellate courts into the trial process and preventing a full and complete review by an appellate court at a premature stage. *Century* at 567. In balancing these factors against other policy considerations, the Tenth Circuit's opinion referred to other circuits at variance with its opinion, and even quoted most fairly the most recent opposing case of *Yaretsky v. Blum*, 592 F.2d 65 (2nd Cir. 1979) and then stated:

> We cannot agree that this is the better rule. Litigants -- appellees as well as appellants -- have a right to rely upon conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisite to the appeal itself. Expense,

> inconvenience, and what a litigant may believe to be injustice, are unavoidable consequences of failure to abide by a statute or rule, e.g., a statute of limitation. There is some virtue in finality -- in an end to litigation. When a notice of appeal is prematurely filed, the case is not in limbo. The trial court retains jurisdiction and a timely appeal may be taken from the final judgment when entered. *Century* at 568.

Thus, the court below concluded that the appeal should be dismissed for lack of jurisdiction.

Another well-reasoned opinion, exactly on point, is the decision of *Stevens v. Turner*, 222 F.2d 352 (7th Cir. 1955), in which the appeal was dismissed, with the same end result as the decision of the Tenth Circuit in this case. In *Stevens*, the appellant had filed his notice of appeal during the pendency of a motion to amend judgment, which is one of the Rule 59 motions mentioned in Rule 4 of the Federal Rules of Appellate Procedure. As was true below, after the entry of the notice of appeal, the appellant's motion was denied. The *Stevens'* court correctly considered whether the motion was merely directed to matters of form or to matters of substance. It is this factual distinction and consideration which was mentioned earlier which dictates that premature appeals such as the one here should not be allowed. Since the appellant's motion was intended to affect substantive rights, the original judgment could not be final. *Stevens* quoted this Court in the case of *Zimmern v. United States*, 298 U.S. 167 (1936), in reminding us that under such circumstances the trial court had plenary power to modify the judgment or even revoke it completely, either of which would render the original judgment non-final. The court dismissed the appeal, stating that since the appellant's appeal was "taken while his motion to amend the judgment was pending, [it] was premature. We acquired no jurisdiction by virtue of it and no after-occurring action or event can inject vitality into it." *Stevens* at 345.

In addition to the Seventh and Tenth Circuits' decisions, the recent case of *Keith v. Newcourt, Inc.*, 530 F.2d 826 (8th Cir. 1976) also reached the same result. That court stated that "it is clear that until the motion for new trial is ruled upon, a judgment is not final and any appeal therefrom is subject to dismissal as premature." *Keith* at 826. Again, it is the factual difference in this type of motion which is important to the consideration of this appeal. That is, that during the pendency of such a motion there is the possibility that the need for appeal will change, and the Eighth Circuit's opinion points out in it footnote that "since a new trial was granted, there exists no certainty that plaintiff will recover on the second trial, rendering the defendant's need for contribution speculative." *Keith* at 826 n.1. It is the policy of the finality doctrine to preclude such speculation, and therefore, the court below correctly dismissed the appeal because at the time the notice of appeal was filed the trial court could have granted the Petitioner's Motion for Judgment n.o.v., rendering the appeal unnecessary.

The Second Circuit has an internal conflict between the case of *Yaretsky v. Blum, supra,* 592 F.2d 65, cited by the Petitioner, and the case of *Napier v. Delaware, Lackawanna and Western Railroad Company*, 223 F.2d 28 (2nd Cir. 1955). *Napier* also involved the filing of motions, there to set aside the verdict and for a new trial. Before the decision thereon, the notice of appeal was filed. The court held that the first notice of appeal was premature and nugatory. The court went on to state that:

> If it seems harsh that the appellant for lack of a timely action is foreclosed from an appeal on the merits of the judgment against it, it must not be forgotten that successful appellees will suffer hardship if belated appeals are allowed to obstruct rights adjudicated by the trial court. However that may be, it is plain that we have jurisdiction to entertain only timely appeals. *Napier* at 31.

Thus, since the finality of a judgment is terminated by a timely motion, there can be no appeal under 28 U.S.C. §1291.

There are two major cases in the Third Circuit which appear to be somewhat contrary with the rule being advocated by the Respondent herein, both of which were cited by Petitioner. However, the case of *Hodge v. Hodge*, 507 F.2d 87 (3rd Cir. 1975) may be distinguished by virtue of the fact that no motion was pending such as is present in the case at bar, and the notice of appeal there was filed following an oral judgment which was formally entered immediately following the filing of the notice of appeal. The case of *Richerson v. Jones*, 551 F.2d 918 (3rd Cir. 1977), also may be distinguished on the same ground that there was no motion filed which could have changed the decision. In addition, in *Richerson* there were multiple appeals and the court clearly had jurisdiction over Richerson's appeal, and therefore, they also considered the government's appeal, although technically premature. Neither of these cases cites the earlier Third Circuit opinion in *Healy v. Pennsylvania R. Co.*, 181 F.2d 934, 936 (3rd Cir. 1950), which stated:

> We are not oblivious of the trend away from those niceties which so often in the past harassed both litigants and the courts. But we are not here insisting upon mere satisfaction of barren formal technicalities. Howsoever liberal we may wish to be, it cannot be gainsaid that certain formalities are indispensable to "just, speedy, and inexpensive" litigation, and these attributes of our federal judicial system are forthcoming only upon adherence to, rather than upon rejection of, the Rules. It is of the highest importance that the appellate function be free of, and protected from, the needless jurisdictional doubts so simply avoidable by compliance with a few specific instructions. The alternative can but induce a laxity destined to obscure the lines of proper appellate conduct, with consequent expense and hardship to the litigants, whose duty it is in the first instance to see to it that the record is in proper form for the relief sought.

The Fifth Circuit case of *Markham v. Holt*, 369 F.2d 940 (5th Cir. 1966), was cited by the Petitioner herein. Again, this case may be distinguished by the fact that there were no motions pending but that the notice of appeal was filed after an oral decision and immediately prior to the entry of the written judgment. It is interesting that the court pointed out that:

> [i]n reaching the conclusion that the defect in the instant appeal is not sufficiently substantial to deprive us of jurisdiction, we would be amiss in failing to urge strongly that in future cases involving premature action of this character another appeal should be perfected after entry of the formal judgment within the time allowed by law. *Markham* at 943.

Unfortunately, the urging of Judge Thornberry was not followed in the subsequent case of *Stokes v. Peyton's Inc.*, 508 F.2d 1287 (5th Cir. 1975). It is difficult to distinguish this case from the case at bar, but it is not difficult to see the danger in this type of decision. In *Stokes*, the notice of appeal was filed over a month before the decision became final. If such practices are allowed, perhaps the most prudent advice that should be given to the practicing lawyer in federal courts is that he should file his notice of appeal at the same time he enters his appearance, so that he does not later forget to do so. *Stokes*, in effect, over-rules the earlier Fifth Circuit case of *Turner v. HMH Publishing Co*, 328 F.2d 136 (5th Cir. 1964), which dismissed an appeal as premature. However, *Turner* gives us a perfect example of why it is important not to allow such premature appeals. There, the appellants had filed a motion to amend the judgment on the same day they filed a notice of appeal. Subsequently, the trial court actually entered an order amending the order, from which no notice of appeal was filed. Under those circumstances, how can an appellant give the requisite notice and contents in his notice of appeal of the order being appealed, pursuant to Rule 3 (c) of the Federal Rules of Appellate procedure? If any policy considerations are given to the finality doctrine and the waste of an appellate court's time,

adherence to the rules should be required.

The Ninth Circuit case of *Eason v. Dickson*, 390 F.2d 585 (9th Cir. 1968) has been frequently cited in favor of allowing premature appeals but can easily be distinguished. In addition to the fact that it is a criminal case, with entirely different rules and policy considerations, the appellant appeared *pro se* and the case did not involve the pendency of a motion as is present in the case at bar. The more recent case of *Song Jook Suh v. Rosenberg*, 437 F.2d 1098 (9th Cir. 1971), is more difficult to distinguish. However, the dangers that were disussed above are still amply present with the result which was rendered in this Ninth Circuit case.

The decision of this Court in *Lemke v. United States*, 346 U.S. 325 (1953), was a decision allowing a premature appeal. The policy considerations were vastly different since it involved a criminal proceeding and a jail sentence, especially considering the criminal rule cited therein and the fact that the government, as opposed to a private party, was the appellee. In addition, this case can be distinguished from the case at bar by virtue of the fact that there was no pending motion and that it was merely a notice of appeal filed three days prior to the formal entry of a written judgment.

The more recent decision by this Court in *Foman v. Davis*, 371 U.S. 178 (1962), is quite supportive of the Respondent's position. There, Rule 59 motions were pending at the time the notice of appeal was filed. Following the denial of the motions, a second notice of appeal was filed. Justice Goldberg allowed the appeal because of the fact that the appellant had filed the second notice of appeal. However, the Court accepted the Court of Appeal's treatment to dismiss the first appeal because a Rule 59 motion was pending. The Court allowed the appeal because of the second notice of appeal from the denial of the appellant's Rule 59 motions. This Court correctly construed the finality doctrine in the context of Rule 3 of the Federal Rules of Appellate Procedure, since at the time of entry of the

order denying the motions, the entire case, including the original dismissal, became final, and subject to appeal. Therefore, this Court has approved of the dismissal of an appeal as premature when the notice of appeal was filed during the pendency of a Rule 59 motion.

Based upon all of these factors, it is respectfully submitted that the Petitioner's Writ be denied and that this Court should adopt the principles stated by the Tenth Circuit Court of Appeals below. Here there was no jurisdiction because of the premature Notice of Appeal. The filing requirements for notices of appeal are not overly technical, such that the requirement to do so constitutes an impediment to one's rights. Neither is it overly technical to require such notices of appeal to be from final judgments to insure that the policy behind the finality doctrine is realized. The Tenth Circuit would have allowed a second notice of appeal to be filed in spite of the earlier premature notice of appeal. Where the litigant attempts to affect a substantial change in the judgment as originally entered, and skillfully uses the various Rules of Civil Procedure as enumerated in Rule 4 of the Federal Rules of Appellate Procedure, those motions should not be treated as extensions of time to file notices of appeal. If the litigant is expecting the court to give consideration to his motions, the litigant should just as carefully consider the filing of his notice of appeal and insure that it is from a final decision. Therefore, the result rendered below by the Tenth Circuit, as well as by other circuits holding the same result, should be affirmed by this Court as being in full accord with reasonable procedural rules and sound policy factors.

POINT III

PETITIONER'S APPEAL SHOULD BE DISMISSED BECAUSE THERE WAS NO APPEAL FROM THE INJUNCTION

Assuming for the purpose of discussion under this Point that the Petitioner's Notice of Apeal filed prior to the entry of the Order Denying the Judgment n.o.v. was adequate under the finality doctrine to grant appellate jurisdiction, there remains the question of the Injunction. Eight days after the entry of the original Judgment from the jury verdict, and on the same day the Petitioner filed his Motion for Judgment n.o.v., the Respondent Century filed its Motion for Injunction. Point II has dealt with the question of the appeal from the Judgment. Assuming for the purpose of this argument that a notice of appeal can relate back to the denial of a motion for judgment n.o.v., which is respectfully opposed in Point II hereinabove, can it be that the same notice of appeal also gives the required notice that the appellant is appealing from an injunction granted two months later? It is respectfully submitted under this Point III that the decision did not become final until the Injunction had been acted upon, which was entered on August 9, 1977. Since there was no notice of appeal from the entry of that Injunction, and since the original Notice of Appeal did not mention the Injunction, there was no appeal from a final decision in this cause, and therefore, the appeal should be dismissed.

Point I hereinabove discussed the finality doctrine and the various requirements for taking an appeal. The case of *Liberty Mutual Insurance Co. v. Wetzel, supra,* 424 U.S. 737, discussed exactly this issue. The plaintiff had sought injunctive relief and damages, and the appeal that was dismissed was an appeal by the defendent from the granting of a motion for summary judgment in plaintiff's favor. This Court discussed various ways that jurisdiction might be established and determined that none of them were applicable. Justice Rehnquist set forth the

policies of the finality doctrine, including the danger of multiple appeals. The decision stands for the proposition that the appeal should await the final determination of the case. Similarly, in the case at bar, the approach that the Petitioner has taken would involve two appeals, assuming that he had done so properly. In fact, even assuming that his first appeal was proper from the Judgment, there is no appeal whatsoever from the Injunction. In the Tenth Circuit, the Petitioner suggested that his Motion to Stay the Injunction, pursuant to Rule 62 (c) of the Federal Rules of Civil Procedure, should act as a Notice of Appeal. This suggestion was strongly and logically rejected by the Tenth Circuit Court. The very wording of Rule 62 (c) seems to show the unsoundness of the Petitioner's position: "[*w*]*hen an appeal is taken* from an interlocutory or final judgment granting, dissolving, or denying an injunction,. . ."[emphasis added]. There was no appeal from the Injunction and therefore, the trial court correctly denied the Motion for Stay of Injunction.

The issue came up in the reverse manner in the case of *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77 (1st Cir. 1957), where the appellate court dismissed the appeal for lack of jurisdiction because there had not been a decision on damages even though an injunction had been entered. The lack of finality under those circumstances required the dismissal of the appeal. Similarly, under the circumstances here, this entire cause should be dismissed because of the lack of finality. It seems to be total and unwarranted distortion to suggest that the Notice of Appeal filed on June 10, 1977, applies to an Injunction granted 60 days later and which is not described in that Notice of Appeal. Respondent Century had pled in its Complaint for both damages and injunctive relief. Therefore, it is submitted under this Point that there was no finality for the purposes of 28 U.S.C. §1291 at the time the Order was entered denying the Motion for Judgment n.o.v. and that the case did not become final for appeal purposes until the Injunction was entered some two months later. Since there was no appeal from the

Injunction, and since the Notice of Appeal did not include by its contents any reference to the Injunction, the appeal should be dismissed for lack of jurisdiction. Here, this should be done by denying the Petitioner's Writ.

CONCLUSION

Based upon the above and foregoing arguments and authorities, it is respectfully submitted that the Petitioner's Petition for Writ of Certiorari be denied and this cause be remanded to the United States District Court for the District of New Mexico for enforcement of the Judgment based upon the jury verdict and the Injunction.

Respectfully submitted,

William J. Lock
Attorney for Respondent
507 Roma, Northwest
Albuquerque, New Mexico 87102
(505) 843-6031